No. 97-174

In The

Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; JOHN STRANNE, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,

Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE RESPONDENT

TRACY A. LABIN
KIM JEROME GOTTSCHALK*
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for the National Congress of American Indians

**Counsel of Record*

January 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

UNITED STATES STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

EXECUTIVE MATERIALS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE AMICUS[1]

Amicus Curiae, National Congress of American Indians (NCAI), is the oldest and largest national organization of Indian governments and individuals in the United States. NCAI is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives, enlightening the public toward a better understanding of Indian people, and preserving rights under Indian treaties and agreements with the United States. Many of NCAI's members have been adversely affected by the era of allotment and the sale of "surplus" lands and have suffered corresponding harm to their sovereignty. NCAI and its members have a vital interest in ensuring that the effects of the allotment era are not extended in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Leech Lake Band of Chippewa Indians (Band) resides on the reservation homeland set aside for it from its aboriginal territory. This reservation has never been disestablished or diminished. *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820, 822 (8th Cir. 1997). Nevertheless, the Band's reservation was allotted and some of its "surplus" land sold pursuant to the Nelson Act of 1889, ch. 24, 25 Stat. 642, which implemented the

---

[1] Counsel for Petitioners and Counsel for Respondents have consented to the filing of the Brief *Amicus Curiae*. The consents are submitted for filing herewith.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

policy of the General Allotment Act of 1887 (GAA), 24 Stat. 388 (codified at 25 U.S.C. §§ 331-349), within the Band's reservation. Some of the allotments passed into fee ownership by non-Indians. In addition, the Nelson Act provided for the sale of "surplus" land directly to non-Indians in fee. Some of these lands were sold under the general homestead laws, while lands classified as "pine lands" were sold pursuant to the specific procedures of the Nelson Act. Recently, in an effort to alleviate some of the devastation caused by the allotment era, the Band repurchased parcels of fee land in all three categories: lands previously allotted, pine lands, and homestead lands.

This Court held, in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), that lands which had been allotted under the GAA are taxable once a fee patent issues, even if acquired later by a Tribe. Shortly after that decision, Cass County (County) imposed taxes on all lands repurchased by the Band, not just those which had been allotted under the GAA. The Band brought suit to prevent such taxation. The Court of Appeals decided that *Yakima* supported the County's authority to tax the lands which had been previously allotted. As to the pine lands and homesteads, the Court of Appeals held that there was not the required clear congressional authorization and therefore the County could not tax those lands. This Court granted certiorari to review the issue of the County's taxing authority over the pine lands and homestead lands.

The Court of Appeals' decision that the County lacks authority to tax the pine lands and homestead parcels now owned by the Band is correct. There is no clear congressional authorization of such taxation as is required by this Court. *California v. Cabazon Band of Mission Indians*, 480

U.S. 202, 215 n.17 (1987); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). Furthermore, the policies underlying the allotment and "surplus" lands era have been repudiated by Congress in extensive legislation that supports tribal self-determination and self-sufficient tribal homelands. This Court has consistently followed Congress' lead when interpreting repudiated Indian policies in the light of intervening legislation. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Seymour v. Superintendent*, 368 U.S. 351 (1962). The Court should follow Congress' lead in this case and affirm the Court of Appeals' decision that the County lacks taxing authority over pine lands and homesteads now owned by the Band.

ARGUMENT

I. THERE IS NO EXPRESS LANGUAGE AUTHORIZING THE TAXATION OF LAND PATENTED AS HOMESTEADS OR PINE LANDS UNDER THE NELSON ACT, AND THUS THE COUNTY IS WITHOUT AUTHORITY TO IMPOSE TAXES WHERE THE LAND TODAY IS OWNED BY THE LEECH LAKE BAND WITHIN THE BOUNDARIES OF ITS RESERVATION

Indian tribes are sovereign entities whose inherent sovereignty precedes that of the United States itself. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Even after their incorporation into the United States, they remain "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25

(1831)." *Oklahoma Tax Commn. v. Potawatomi Tribe*, 498 U.S. 505, 509 (1991). Tribal sovereignty thus contains a "significant geographical component." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983). Tribes' sovereignty is subordinate only to the Federal Government, not the states, and states may not tax Indian land within Indian country unless Congress has made its intention to authorize such taxation "unmistakably clear." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985); *Washington v. Confederated Tribes*, 447 U.S. 134, 153-54 (1980); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *County of Yakima v. Yakima Nation*, 502 U.S. 251 (1992).

There is no express language in the Nelson Act authorizing the taxation of land sold as pine lands or as homesteads. This lack of express congressional authorization should end the matter. The lands are not subject to taxation. *See Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (general language which made allottees "subject to the laws . . . of the state" did not explicitly subject allottees to plenary taxing jurisdiction of state); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (general language extending "civil laws . . . of general application" was not an express congressional grant of power to tax reservation Indians); *But see County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992) (express language stating that "all restrictions . . . to *taxation* . . . shall be removed" manifested clear congressional intent to permit in rem taxation) (emphasis added). If there is any question about this result, however, all doubt should be eliminated by the fact that the allotment policy under which the land was originally disbursed has been thoroughly repudiated

and Congress has firmly committed to a policy of self-determination.

II. IN THE ABSENCE OF EXPRESS LANGUAGE AUTHORIZING TAXATION, THE FACT THAT CONGRESS REPUDIATED THE ALLOTMENT ERA LEGISLATION AND ENACTED COMPREHENSIVE LEGISLATION SUPPORTING TRIBES AS SELF-GOVERNING ENTITIES WITHIN PERMANENT, SELF-SUSTAINING HOMELANDS COMPELS AN INTERPRETATION THAT THE HOMESTEAD AND PINE LANDS PROVISIONS DO NOT AUTHORIZE THE COUNTY'S TAXATION OF THESE LANDS NOW HELD IN FEE BY THE LEECH LAKE BAND WITHIN THE BOUNDARIES OF ITS RESERVATION

A. This Court Consistently Weighs Intervening Legislation In Interpreting Indian Legislation Whose Policy Has Been Repudiated.

The Court has consistently followed Congress' lead, as expressed in intervening legislation, when interpreting Indian legislation whose underlying policy has been repudiated. Specifically, this Court has looked to intervening legislation to ensure that its interpretation of a particular statute is consistent with current policy and also to clarify ambiguities. *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

In *Seymour v. Superintendent*, the question was whether the "South Half" of the Colville Reservation was under exclusive federal criminal jurisdiction or whether the reservation had been diminished so as to provide state criminal jurisdiction over a crime committed by an Indian on fee-patented land owned by a non-Indian. To

determine whether the reservation had been diminished, the Court looked to a 1906 Act which opened the South Half to allotment and sale of surplus lands under the homestead laws. Because there was no language "expressly vacating the South Half of the reservation and restoring that land to the public domain," the Court held that the 1906 Act did not diminish the reservation. 368 U.S. at 355. The Court looked to later congressional enactments to confirm that its interpretation of the 1906 Act was correct: "That this is the proper construction of the 1906 Act finds support in subsequent congressional treatment of the reservation. Time and time again in statutes enacted since 1906, Congress has explicitly recognized the continued existence as a federal Indian reservation of this South Half. . . . " *Id.* at 356.

The Court also looked to later congressional enactments to answer the state's argument that even if the 1906 Act did not completely diminish the reservation, the reservation had been diminished at least as to land patented to non-Indians. Specifically, the Court stated:

> This contention is not entirely implausible on its face, and indeed, at one time had the support of distinguished commentators on Indian law. *But the issue has since been squarely put to rest by congressional enactment* of the currently prevailing definition of Indian country in § 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent. . . . "

368 U.S. 357-58 (referring to Felix S. Cohen, *Handbook of Federal Indian Law*, 359 (1942 ed.)) (emphasis added) (footnote omitted).

In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Court rejected Montana's claim to reservation-wide taxing jurisdiction. Montana relied largely on Section 6 of the GAA, 25 U.S.C. § 349, which made Indians "subject to the laws . . . of the State . . . " once they received a patent in fee and on *Goudy v. Meath*, 203 U.S. 146 (1906), which held that this phrase included state tax laws. The Court rejected these arguments even as to Indians residing on reservation fee lands, noting that the policy of allotment and sale of surplus land had been repudiated by the Indian Reorganization Act. 425 U.S. at 479. *See* further discussion at Section II.C.1, *infra*.

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court addressed the issue of "whether the grant of civil jurisdiction to the States conferred by § 4 of Pub. L. 280 . . . is a congressional grant of power to the States to tax reservation Indians. . . . " 426 U.S. at 375. Recognizing the general rule that State taxing authority does not extend within an Indian reservation absent express authority, the Court looked for such authority in the language of § 4 and its legislative history, and found none. The Court then looked to later congressional enactments, noting that "we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments." *Id.* at 386 (citations omitted). The Court concluded that its interpretation refusing state taxing jurisdiction was consistent with the later enacted Title IV of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1321-1326, which required tribal consent to a state's assumption of jurisdiction.[1] *Cf. Menominee Tribe v.*

---

[1] Additionally, the Court found that in construing an ambiguous statute, "we must be guided by that 'eminently

United States, 391 U.S. 404 (1968) (interpreting Menominee Termination Act in light of subsequent P.L. 280 to hold that hunting and fishing rights saved by the latter were not terminated by the former.)

In this case, the Court should follow its normal course and weigh the intervening legislation since the Nelson Act. If it does so, the only outcome consistent with congressional intent is to deny the County's authority to tax the homestead and pine lands acquired by the Band. To hold otherwise the Court would have to "strain to implement [an assimilationist] policy Congress has now rejected," a course of action this Court has rejected, "particularly where to do so [would] interfere with the present congressional approach to what is, after all, an ongoing relationship." *Bryan*, 426 U.S. at 388 n.14 (*quoting Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975)).

B. Congress Has Thoroughly Repudiated Allotment Policy

Since the founding of the United States, federal Indian policy has evolved and changed several times. One of the earliest periods of Indian policy is known as the removal and reservation period. During that period,

---

sound and vital canon,' that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities . . . " 426 U.S. at 392 (citations omitted).

the United States negotiated numerous treaties similar to that it negotiated with the Leech Lake Band, whereby huge areas of aboriginal territory were surrendered and separate, sharply-circumscribed, reservations were set aside as homelands for the tribes. Then, beginning late in the nineteenth century, Congress moved to a policy of breaking up reservations and apportioning land to individual Indians in order to encourage Indians to adopt an agrarian lifestyle and to assimilate into general American society. *See* Felix S. Cohen, *Handbook of Federal Indian Law*, 131-32 (1982 ed.). During this ill-conceived[2] period of

---

[2] That the policy was ill-conceived is not simply hindsight. The record was there for all to read. Allotment had been tried on a small scale in previous treaties, a number of them negotiated by former Commissioner of Indian Affairs, George Manypenny. His pre-General Allotment Act appraisal, in 1885, of the legacy of those attempts is as follows:

> When I made those treaties I was confident that good results would follow. Had I not so believed I would not have been a party to the transactions. Events following the execution of these treaties proved that I had committed a grave error. I had provided for the abrogation of the reservations, the dissolution of the tribal relation, and for lands in severalty and citizenship; thus making the road clear for the rapacity of the white man. I had broken down every barrier. I had committed a grevious (sic) mistake, and entailed on the Indians a legacy of cruel wrong and injury. Had I known then, as I now know, what would result from those treaties, I would be compelled to admit that I had committed a high crime.

Quoted in Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 63 (1995).

allotment and assimilation, many tribes had their reservations allotted, their "surplus" lands sold, and their territories correspondingly decimated. During this period, the already restricted land base was reduced from 134 million acres to approximately 44 million. Approximately 27 million acres were lost due to allotment, and another 60 million acres were lost due to the selling of "surplus" lands. *Id.* at 138.

As evidenced by a 1928 report, *Institute for Government Research, The Problem of Indian Administration* (L. Meriam ed., Baltimore: The Johns Hopkins Press, 1928) ("Meriam Report"), the results of the land loss were disastrous. The overwhelming majority of Indian people were pauperized. Living in destitution, Indian people suffered some of the highest malnutrition and mortality rates, and the lowest levels of education and standard of living of any group in the United States. *See generally,* Meriam Report. As the then Commissioner of Indian Affairs, John Collier, reported to Congress about the allotment policy:

> It is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul while pauperizing him, and cast him in so ruined a condition into the final status of a nonward dependent upon the States and counties.

To Grant to Indians Living Under the Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 18

(1934) (memorandum presented into record by John Collier, Commissioner of Indian Affairs).[3]

In time, Congress acknowledged that there was a significant nexus between a sufficient land base and the economic and cultural survival of Indian tribes. *See* 78 Cong. Rec. S11 (daily ed. June 12, 1934) (Statement of Sen. Wheeler). Thus Congress repudiated the allotment policy through the Indian Reorganization Act of 1934, Ch. 576, 48 stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1983)); *See Hodel v. Irving,* 481 U.S. 704, 708 (1987). In the years since that repudiation, Congress has made ever more clear that reservations are permanent homelands within which tribes are to attain the greatest degree of self-determination and self-sufficiency possible. Today, as this Court has recognized "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodies (sic) in numerous federal statutes." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-335 (1983).

C. Intervening Legislation Since The Nelson Act Forecloses County Authority To Tax Repurchased Homesteads And Pine Lands

1. Indian Reorganization Act.

The primary expression of Congressional intent repudiating the era of allotment and sale of "surplus" lands is of course the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-479. Through the IRA, Congress stopped all

---

[3] A comprehensive discussion of this era and its continuing effects on Indian law is contained in Royster, *supra.*

further allotment, 25 U.S.C. § 461, indefinitely extended existing periods of trust and restrictions on alienation, 25 U.S.C. § 462, and authorized the Secretary of the Interior to restore to tribal ownership any reservation lands that had not been allotted, 25 U.S.C. § 463, and "to provide land for Indians." 25 U.S.C. § 465.

This Court has previously considered the effects of the IRA on prior legislation. In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), this Court looked to the IRA and to other legislation to determine whether § 6 of the General Allotment Act (GAA) authorized state imposition of reservation-wide cigarette sales, personal property taxes and vendor-licensing fees. The State relied upon language in the GAA, 25 U.S.C. § 349, which subjected the allottees "to the laws . . . of the State" once they received a patent in fee and on *Goudy v. Meath*, 203 U.S. 146 (1906), which held that this phrase included state tax laws. After finding that the GAA itself precluded imposition of taxes on trust land, the Court looked to intervening legislation to interpret what the general phrase "laws of the State" meant for the fee patents. The Court held that due to the effects of the IRA and other legislation, the state lacked jurisdiction on the fee land as well. On this point the Court stated:

> The State has referred us to no decisional authority – and we know of none – giving the meaning for which it contends to § 6 of the General Allotment Act in the face of many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands – statutes discussed, for example, in McClanahan, 411 U.S., at 173-179. . . . *Congress by its more modern legislation has evinced a clear*

> *intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.*

425 U.S. at 479. (emphasis added) (citations omitted).

In *Yakima*, the Court again considered the effects of the IRA on allotment era legislation. The Court recognized that "[i]n light of Congress' repudiation in 1934 of the policies behind the General Allotment Act, we concluded [in *Moe*] that the Act could no longer be read to provide Montana plenary jurisdiction even over those Indians residing on reservation fee lands." *County of Yakima v. Yakima Nation*, 502 U.S. 251, 261 (1992). However, in *Yakima*, the Court refused to find that the IRA implicitly repealed what it found to be an explicit congressional grant of taxing authority over land allotted under the GAA. 502 U.S. at 262.

Yakima is not controlling here, however, even if it was itself correctly decided.[4] In this case, Congress did not

---

[4] *Amicus* respectfully suggests that *Yakima* itself was incorrectly decided. The Court stated:

> Except by authorizing reacquisition of allotted lands in trust, however, Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints on the ability of Indian allottees to alienate or encumber their fee-patented lands nor impaired the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands allotted under the Dawes Act. *See* W. Washburn, *Red Man's Land/ White Man's Law* 145 (1971). . . . And when Congress, in 1934, while putting an end to further allotment of reservation land, chose *not* to return allotted land to

explicitly grant the county's taxing authority over the pine lands or over the homestead parcels.[5] Therefore,

---

pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs, and assigns, it chose not to terminate state taxation upon those lands as well.

502 U.S. at 255-256, 264 (emphasis in original) (citations omitted). This characterization of Congress' failure to totally repudiate the effects of the Allotment era and the effects of that failure at total repudiation are incorrect. The Court's characterization fails to appreciate the practical restraints under which Congress was acting. To impair the rights of non-Indians who had acquired property interests protected by the Fifth Amendment would have cost the federal government untold millions of dollars at a time of severe depression in the economy. A blanket reimposition of trust status would also have implicated fifth amendment interests since Congress could not have known which lands had been put up as security for loans.

That this was Congress' concern was made clear by the passage in 1927 of legislation authorizing the taking back into trust of lands where such lands had not been mortgaged or sold. 25 U.S.C. § 352a. That remedy was later extended in 1931 to land which had been mortgaged, but was now free and clear. 25 U.S.C. § 352b. Congress' concern not to impair non-Indian rights to property, in no way indicates a choice not to terminate state authority to tax those lands. There is no protected Fifth Amendment right in the County to continue taxing land which passes into Indian ownership.

[5] In *Yakima*, the Court found that the land was freed of *all* restriction as to taxation. One of the restrictions removed was the normal rule of federal Indian law that land owned by an Indian or by a tribe within Indian country is outside of state taxing authority. In other words, *Yakima* construed the GAA as effectuating a change in the normal rule that such taxing authority does not exist. Here, there is no language changing the ordinary rule. The land that passed to non-Indian ownership as pine lands or homesteads became taxable consistent with the

there is no argument that the IRA repeals an explicit grant of authority. Rather, *amicus* urges this Court to look to the IRA to inform the interpretation that Congress did not authorize the County's jurisdiction to tax the homestead and pine lands parcels once they were reacquired by the Band.

As this Court has recognized, the "intent and purpose of the IRA was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (*quoting* H.R. Rep. No. 1804, 73d Cong, 2d Sess; 6 (1934)). In addition, the IRA was meant to consolidate Indian lands, "a public purpose of high order." *Hodel v. Irving*, 481 U.S. 704, 712 (1987). The Band took precisely the type of initiative supported by the IRA when it purchased the lands at issue here.[6] It was using self-help to remedy the effects of the allotment era – a result clearly intended by Congress through the IRA. *Amicus* urges this Court to

---

normal rule that state taxing authority does extend to non-Indian property within Indian country. But upon repurchase by the Band, nothing interferes with operation of the normal rule that state taxing authority does not extend to Indian land within Indian country. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (holding that there is a per se rule against state taxation of tribes and tribal members within Indian country).

[6] The Band paid for the land, so there is no Fifth Amendment problem. The county has no protected property interest in the right to tax land within Indian country anymore than it has such an interest in taxing newly purchased property belonging to non-profit organizations or the federal government.

recognize the clear congressional intent to reverse the policy of allotment and to foster the growth of tribal land bases evidenced in the IRA, and to give meaning to that intent by confirming that the homestead parcels and pine lands owned by the Band are not taxable. To hold otherwise, would be giving renewed life to the repudiated allotment policy, for lands subject to tax will again be subject to loss.

2. Indian Country Statute

The Indian Country statute, passed in 1948, reads in relevant part:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian Country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . .

18 U.S.C. § 1151.

This is the precise provision that this Court turned to in *Seymour v. Superintendent*, 368 U.S. 351 (1962), to hold that the state did not acquire criminal jurisdiction over crimes committed by Indians on fee land owned by non-Indians within the boundaries of a reservation. Since *Seymour* was decided, this Court has made it clear that the § 1151 definition of Indian country applies to civil jurisdiction as well as criminal jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, n.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425,

427, n.2 (1975). In particular, this Court has held that § 1151 is the applicable definition for determining state taxing jurisdiction. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993). *Sac and Fox* held that in determining whether the rule against state taxation of tribes or individual Indians applies, "we ask only whether the land is Indian country." 508 U.S. at 125. In describing Indian country, the Court cited 18 U.S.C. § 1151. *Id.* at 123. *See also, Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995).

The land at issue here is Indian country within the definition of § 1151. And, as in *Moe*, this Court should view this statute as an important piece of intervening legislation arguing against state jurisdiction over lands within Indian country. *Cf. United States v. Mazurie*, 419 U.S. 544, 554-55 (1975). *Amicus* urges this Court to apply the principles of Indian country to these lands and to recognize that these lands, like the rest of Indian country, constitute "the special territory where Indians are governed primarily by tribal and federal law rather than state law." Cohen (1982 ed.), at 28.

3. Indian Civil Rights Act.

The Indian Civil Rights Act was passed in 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1341). "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). In passing the Indian Civil Rights Act, Congress modified

this situation somewhat "by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Id.* at 57. In addition, the Act abrogates prior law to the contrary and provides that Indian tribes must give prior consent before states may assume civil or criminal jurisdiction over Indian country. *Id.* at 63-64.

It was the requirement for tribal consent which this Court took into account in *Bryan v. Itasca County*, 426 U.S. 373 (1976), in deciding that P.L. 280, another piece of assimilationist legislation, did not grant states regulatory jurisdiction over Indian country. As in *Bryan*, a finding here that the County lacks the authority to tax tribally owned land patented as homesteads or pine lands is consistent with the Indian Civil Rights Act.

4. Indian Self-Determination Act And Tribal Self-Governance Act.

Since repudiating the allotment policy with the passage of the IRA, Congress has striven with ever-increasing awareness and clarity to confirm tribes as self-governing entities within permanent homelands.[7] One of the most significant congressional pronouncements of current federal policy is the Indian Self-Determination

---

[7] This is not to say that Indian policy has been altogether free of schizophrenia since 1934. For a brief period, mainly in the 1950s, Congress experimented with the assimilationist policy of termination. The policy of termination lasted only a short while and Congress has officially repudiated and rejected "House Concurrent Resolution 108 of the 83rd Congress and any policy of unilateral termination of Federal relations with any Indian Nation." 25 U.S.C. § 2502(f).

and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, 458aa-hh (1983 & 1997 Supp.), which provides for the contracting of federal services to Indian tribes. Through this Act, Congress clearly stated its intent to preserve and promote Indian tribes. The Declaration of Policy states that:

> Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a (1983 & 1997 Supp.).

The Indian Self-Determination Act was enhanced by passage of the Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. 102-184, 105 Stat. 1278, and the Tribal Self-Governance Act, Pub. L. 103-413, Title II, 108 Stat. 4270 (1994) (codified at 25 U.S.C. §§ 458aa-458hh. (1997 Supp.)). In resounding support for tribal self-governance, Congress stated

> It is the policy of this title to permanently establish and implement tribal self-governance –
>
> . . . to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes . . . to ensure the continuation of the trust responsibility of the United States to Indian tribes and

> Indian individuals . . . [and] . . . to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority to plan, conduct, redesign, and administer programs, services, functions, and activities that meet the needs of the individual tribal communities. . . .

Section 203 of Pub. L. 103-413.

Congress has expressed in straightforward terms its support for tribes to be self-governing to the greatest extent possible.[8] Tribal sovereignty and self-government do not, however, occur within a vacuum, they have a geographical component. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983). Within a tribe's territory, its sovereignty is subject only to federal, not state authority. *Washington v. Confederated Tribes*, 447 U.S. 134, 153-154 (1980); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 173-179 (1973). To the extent that a tribe loses a

---

[8] Other expressions of this support are found in the Indian Financing Act, 25 U.S.C. § 1451 (stating that it is Congress' policy that Indians "fully exercise responsibility for the utilization and management of their own resources"); the Tribal Justice Act, 25 U.S.C. § 3601 (1997 Supp.) (recognizing "the self-determination, self-reliance, and inherent sovereignty of Indian tribes"); and Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501(7). In addition, commitment to the current policy of self-determination has also been vigorously promoted by the executive branch. *See* Statement by President Richard Nixon, President's Special Message to Congress on Indian Affairs. Pub.Papers 564-76 (Jul. 8, 1970); Statement by President Ronald Reagan, Statement on Indian Policy, 19 Weekly Comp.Pres.Doc. 98 (Jan. 24, 1983); President Clinton, Address at Tribal Leaders Event (April 29, 1994), reprinted in U.S. Department of Interior, Bureau of Indian Affairs, vol. 18, no.4 (1994).

measure of sovereignty over its territory, its ability to self-govern is impaired and congressional policy is thwarted. To allow the County a measure of sovereignty over the Band's land in this case is to thwart Congress' policy of self-determination for Indian tribes.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals as to the homestead parcels and pine lands should be affirmed.

Respectfully submitted,

TRACY A. LABIN
KIM JEROME GOTTSCHALK*
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for the National Congress of American Indians

**Counsel of Record*

January 1998